February 5, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Presentation, CC Dkt. Nos. 01-338, 96-98, 98-147, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Appropriate Framework For Broadband Access to the Internet Over Wireline Facilities, CC Dkt. Nos. 02-33, 95-20, 98-10

Dear Ms. Dortch:

El Paso Global Networks, ("EPGN") hereby submits the attached position paper to provide the Commission with additional information regarding the obligations of Incumbent Local Exchange Carriers ("ILECs") to provide unbundled dark fiber and other unbundled network elements under the Telecommunications Act of 1996. EPGN submits this position paper in response to, among other items, the Ex Parte Communication submitted by SBC Communications, Inc. on January 15, 2003.

We are submitting this filing electronically in accordance with the Commission's rules.

Please include a copy of this submission in the record of the above-listed proceedings. You may contact either or both of us at the address below should you have any questions.

Respectfully,

/s/

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Ex Parte Presentation
CC Dockets 01-338, 96-98 , 98-147,
02-33, 95-20, 98-10
February 5, 2003

Ex Parte Presentation of El Paso Global Networks
CC Docket Nos. 01-338, 96-98, 98-147
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers
CC Docket Nos. 02-33, 95-20, 98-10
Appropriate Framework For Broadband Access to the Internet Over Wireline Facilities

I. SUMMARY

The Commission should reject the self-serving pleas of SBC Communications, Inc. ("SBC") and other incumbent local exchange carriers ("LECs") suggesting that they will increase deployment of fiber-to-the-home ("FTTH") and other next generation technologies if only the Commission removes dark fiber from the list of unbundled network elements ("UNEs") for the following reasons:

- ILECs have a long record of making false promises in exchange for regulatory relief which they subsequently fail to fulfill as demonstrated by their failure to provide video programming;
- It is the threat of competition, not immunity of regulation, that is the key catalyst to encourage ILECs to build broadband networks as demonstrated by the ILECs reluctance to deploy DSL for a decade until competitive pressure from CLECs and cable companies compelled a response;
- SBC's proposal attempts to draw a distinction between packet fiber and non-packet fiber that is unworkable, has no technical basis, and is pure fiction because there is no technical difference between fiber that is intended to be used to provide services that utilize packet technologies and fiber that is intended to be used to provide services that utilize TDM technology or other "non-packet" technology;
- EPGN has invested over $400 million to utilize SBC's dark fiber; and by investing such large sums to light unused, spare dark fiber, CLECs make efficient use of this excess fiber capacity as compared to leaving this excess fiber unused in the ILEC network.

In light of these considerations:

- The Commission should continue to require ILECs to provide unbundled access to dark fiber in the loop on a national basis, and should not impose any arbitrary limits on the ability to light dark fiber at a particular capacity level nor impose use restrictions that limit the CLECs ability to innovate and create new markets;
- To the extent the Commission exempts ILEC deployment of "new fiber" in the loop from unbundling, it must only do so in the *residential* market, and obviously only in the loop plant;

II. THE ILECS HAVE A TRACK RECORD OF RENEGING ON PROMISES TO DEPLOY NEW TECHNOLOGY IN EXCHANGE FOR REGULATORY RELIEF

In ex parte meetings with Commissioner Kevin Martin and Daniel Gonzalez conducted on January 14, 2003, SBC made a proposal that implies at bottom that in exchange for the Commission removing dark fiber in the loop from the list of unbundled network elements available to competitive local exchange carriers ("CLECs") and precluding state commissions from extending UNE regulation to fiber loops, SBC would significantly increase deployment of fiber-to-the-home ("FTTH").[1] The Commission should be extremely wary of unenforceable and uncertain incumbent LEC ("ILEC") promises to increase investment in new technologies in exchange for regulatory relief. SBC and the other ILECs have a proven track record of reneging on such promises once regulatory relief is obtained because they realize the Commission has no effective means of enforcing these hollow promises; they are reluctant to cannibalize existing profitable services; and they are reluctant to invest in new technologies without the guaranteed rates of return that have historically been their unique privilege.

Moreover, implied ILEC promises that they will build fiber-to-the-home if relieved of unbundling obligations are no more than the latest manifestation of their traditional attempt to manipulate policy makers by promising to provide desired services if they are permitted to retain their monopoly over local services. The Commission should reject this promise if for no other reason than that ILECs have a long record of making false promises in exchange for regulatory relief which they subsequently fail to fulfill. For example, the ILECs for years promised that they would build broadband common carrier networks that would make it possible for consumers to receive a host of new services if only the Commission or Congress would remove the restrictions on their provision of video programming.[2] In response to their lobbying, Congress granted that request in the "Open Video System" provisions of the Telecommunications Act of 1996.[3] However, at this time, none of the ILECs have built networks capable of providing video programming and other services. In essence, their response to the grant of their requested relief has been no more than to make more demands on policy makers, including the radical demand

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[1] Ex Parte Presentation of SBC Communications, Inc. CC Docket No. 01-338, at 2 (filed January 15, 2003) ("SBC Ex Parte").

[2] *Telephone Company - Cable Television Cross-Ownership Rules,* Second Report and Order, Recommendation to Congress, and Further Notice of Proposed Rulemaking, CC Docket No. 87-266, 7 FCC Rcd 5781, 119 (1992).

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47U.S.C. §§ 251 et seq. (the "Act"); see 47 U.S.C. § 653.

that broadband networks not be subject to any common carrier regulation.[4] If SBC's latest request were granted, ILECs would not fulfill their current promises to build advanced FTTH, absent permission to cross-subsidize and raise consumer rates, because very advanced broadband networks are not yet economically viable due to a lack of innovative service offerings, compelling applications and consumer demand. In fact, the Commission's goal of achieving ubiquitous availability of broadband, beyond what is already available, is most likely to be achieved by a thorough-going and vigorous implementation of the pro-competitive provisions of the Act, including unbundling obligations – not by gutting the Act in exchange for hollow ILEC promises.

Indeed, it is the threat of competition, not immunity from regulation, that best encourages ILECs to build broadband networks. Asymmetric Digital Subscriber Line ("ADSL") technology, for example, was first developed by Bellcore in 1989 as a way to send video and television signals to end users over standard copper cables in order to compete with cable companies.[5] The ILECs, however, left this advanced technology lie dormant for about a decade. Only the combined competitive pressure from CLECs who deployed DSL technologies to capture small and medium sized business customers who were purchasing expensive ILEC T-1 and ISDN services from ILECs, and from cable companies who deployed cable modem technology to increase revenues from residential customers, finally prompted a competitive deployment (*i.e.,* non-trial deployments) by some ILECs around the 1998-99 timeframe.[6] The ILECs were slow to deploy DSL technologies because these technologies threatened to cannibalize their long established revenues from highly profitable services such as T-1, fractional T-1, and ISDN.[7]

Further, as traditional monopolists accustomed to making investments only where guaranteed a rate of return is provided by regulators, the ILECs simply lack the entrepreneurial drive and ability to undertake the risks that investment in new technologies inevitably entails.

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[4] *See* Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, Federal Communications Commission (Jan. 9, 2002), cited at fn. 61, *Broadband NPRM*.

[5] Amitava Dutta-Roy, *A Second Wind for Wiring*, September, 1999, at 54 ("IEEE Spectrum"); Annabel Z. Dodd, The Essential Guide to Telecommunications 152 (1998).

[6] IEEE Spectrum, at 53-54; Brian L. Hinman, *ADSL Comes Home*, Telephony, May 24, 1999, at 40 ("These new CLECs have begun to offer services at very attractive rates relative to traditional T-1 service, making it apparent that the RBOCs had better get aggressive on DSL or risk losing a substantial part of their business to these upstarts.").

[7] Brian L. Hinman, Telephony, at 40 (DSL was forced to overcome the RBOC "reluctance to roll out DSL services for fear of cannibalizing their T-1 (1.54 Mb/s) and ISDN revenues."); David Schober, *Town Country: CLECs and Incumbents Aren't Playing the Same DSL Game – For Now Anyway*, Telephony, May 24, 1999, at 31 and 36.

The history of the marketplace demonstrates unequivocally that competitive pressure from other carriers is the key catalyst for ILEC investment in new technologies as opposed to regulatory relief that would only solidify ILEC monopoly power over essential "last mile" facilities.

Accordingly, the Commission should continue to demand that ILECs provide high-speed transport and loop UNEs, including dark fiber loop and transport UNEs, which are the cornerstone of facility-based competition today. In particular, the Commission should continue to require ILECs to provide unbundled access to dark fiber in the loop on a national basis, and should not impose any arbitrary limits on the ability to light dark fiber at a particular capacity level nor impose use restrictions that limit the CLECs ability to innovate and create new markets.

To the extent the Commission exempts ILEC deployment of "new fiber" in the loop from unbundling, despite the lack of record evidence supporting such an exemption, it must only do in the *residential* market, and obviously only in the loop plant.

III. SBC'S PROPOSAL WOULD PERMIT ILECS TO ARBITRARILY DESIGNATE DARK FIBER AS PART OF THEIR PACKET NETWORK IN ORDER TO REMOVE SUCH FIBER FROM THE UNE INVENTORY

In the SBC Ex Parte, SBC repeatedly argues that the Commission should make a bright-line distinction between the ILECs' "packet fiber loop" investment, which would be wholly exempt from UNE regulation, and Time Division Multiplex ("TDM") fiber or "Non Packet Fiber," which would continue to be available to CLECs in those instances in which CLECs could demonstrate "impairment" under the ILECs' extremely narrow view of the Act's impairment test in Section 251(d)(2).[8] SBC's proposal attempts to draw a distinction between packet fiber and non-packet fiber that is unworkable, has no technical basis, and is pure fiction created simply to advance SBC's monopolistic agenda. There is no technical difference between fiber that is intended to be used to provide services that utilize packet technologies and fiber that is intended to be used to provide services that utilize TDM technology or other "non-packet" technology based services – the difference is in the terminal equipment attached to the fiber, not in the fiber optic cable. Fiber optic cable is agnostic as to whether it is used to provide services based on packet technologies or services based on TDM technologies. In fact, a carrier can use the same identical fiber strand that it uses to provide services based on TDM technologies to simultaneously provide services based on packet technologies. In the SBC Ex Parte, SBC appears to trumpet deployment of a FTTH solution that employs Passive Optical Network ("PON") technology. In some implementations PON technology actually employs services

[8] SBC Ex Parte, at 2, 5, 8 and 9.

based on TDM technologies in order to multiplex signals into several homes, casting further doubt on SBC's packet fiber versus non-packet fiber distinction.[9]

Moreover, because there is no technical difference between dark fiber that is intended to be used to provide services based on packet technologies and dark fiber that is intended to be used to provide services based on TDM technologies or other services, SBC's proposal would provide ILECs with unbridled discretion to unilaterally determine that all of their unused dark fiber strands, whether deployed in the ground before or after the FCC's order in this proceeding, constitutes an investment in their packet networks. This ruse would enable the ILECs to remove all dark fiber from the inventory of UNEs available to CLECs. Additionally, as SBC deploys its FTTH, existing feeder fiber to remote terminals and other serving area interface points, it, or other ILECs, could re-brand the fiber as "packet fiber," thus removing this existing fiber capacity from the inventory of lit fiber UNEs and dark fiber UNEs available to CLECs. Further, SBC's proposed distinction between lit "packet-fiber" and "non-packet" fiber is meaningless because SBC's PON network merely provides a transport service that can readily be utilized to transport T-1 signals. In fact, as SBC's June 2001 *ex parte* presentation to the Commission demonstrates (Exhibit A attached hereto), SBC intends to use its PON network to carry T-1 signals, thus rendering SBC's distinction between a packet and non-packet fiber completely meaningless.[10] SBC's presentation before the Commission in June 2001 demonstrates that BPON is a network architecture for all services, not just broadband and in its early stages SBC is intent on using BPON to migrate T-1 service typically provided to business customers. This is consistent with SBC's prior statements regarding the migration of its network from one based on copper to one based on fiber optics. For instance, in February 2002, Wayne Masters, then SBC's Senior Vice-President-Network Services noted that Project Pronto,

> "wasn't just an overlay for broadband. It was to improve our voice network, our special services, and our regular DS1, DS3, OCN services, and to put a lot of fiber in the network and take care of the DSL needs along the way."[11]

Mr. Masters further notes that SBC deployed Pronto as a first step towards fiber to the home. For example he claims that Pronto "was built knowing [SBC] was going to the next step. A lot of the PON architecture is built into my Pronto architecture." Similarly SBC has also said that its network would ultimately have "all services commingled…whether they're data or digital

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[9] James Green, The Irwin Handbook of Telecommunications, at 309 (4th ed. 2000).

[10] Ex Parte Letter from William A. Brown, SBC Telecommunications, Inc., Docket CC 96-98, filed June 28, 2001 at p. 12-13.

[11] On the Record, Interview with Wayne Masters, Senior Vice President SBC-Network, Telecommunications Reports Feb. 11, 2002, W-1

or voice."[12] In sum, there is no difference between packet and non-packet fiber. EPGN and other CLECs seek access to unbundled dark fiber that the ILECs are not using in their PON network or legacy network to provide packet, TDM or any other technology based services.

SBC's proposal ignores the fact that currently most ILEC loop dark fiber is deployed between central offices and business customers. As discussed in more detail below, permitting CLECs to access this unused dark fiber as a UNE fosters facilities based competition to business customers. CLECs, such as EPGN, must make a substantial investment in equipment in order to light and use unbundled dark fiber obtained from ILECs. In fact, EPGN has invested over $400 million in Texas to utilize SBC's dark fiber. By investing such large sums to light unused, spare dark fiber, CLECs make efficient use of this excess fiber capacity as compared to leaving this excess fiber unused in the ILEC network. Additionally, CLEC investment in advanced telecommunications equipment and software to light dark fiber provides substantial revenue to telecommunications equipment providers in these challenging economic times. Additionally, the alternative transport networks provided by EPGN and other CLECs allow smaller CLECs to creatively offer create new markets by providing innovative competitive alternatives to consumers while avoiding large, unnecessary and duplicative up front fiber capital costs. Further, the facilities and services provided by EPGN and other CLECs using dark fiber also foster competition in the wireless marketplace. Also, by having access to technology and service agnostic dark fiber, the CLEC can become a facilities-based alternative by lighting the dark fiber, and providing innovative new services and applications that differentiate themselves from the services the ILEC provides.

IV. AVAILABILITY OF DARK FIBER ON EFFICIENT TERMS AND CONDITIONS ADVANCES THE COMMISSION'S GOAL OF PROMOTING FACILITIES-BASED COMPETITION

Because CLECs must make a substantial investment in equipment in order to light and use unbundled dark fiber obtained from incumbent local exchange carriers ("ILECs") and this fiber typically forms an integral and even essential part of the CLEC's network, unbundled dark fiber promotes facilities-based competition in a unique way. In fact, EPGN has invested about $400 million to light the unbundled dark fiber that it has obtained from SBC in its area of operations - Texas. Similarly, Conversent Communications, LLC ("Conversent"), to date, has spent over $30 million in capital costs in connection with its fiber networks.[13] This sizable investment is necessary to engineer, purchase, and install advanced electronics/optronics such as multiplexing equipment, Dense Wave Division Multiplexing ("DWDM") equipment, and other advanced equipment to light and use the dark fiber. By investing such large sums to light

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[12] On the Record, Interview with Ross Ireland, Chief Technical Officer SBC, Telecommunications Reports June 17, 2002 at W-1.

[13] Ex Parte Presentation of Conversent to Christopher Libertelli, dated October 22, 2002, at 3.

unused, spare dark fiber, CLECs make efficient use of this excess fiber capacity as compared to leaving this excess fiber unused in the ILEC network. Further, CLEC investment in advanced telecommunications equipment and software to light dark fiber provides substantial revenue to telecommunications equipment providers in these challenging economic times, and it allows CLECs to innovate, develop differentiated services, and develop new markets apart from the ILEC.

In addition to the substantial investment in optronics/electronics to light the dark fiber, competitive carriers utilize UNE dark fiber as an integral part of their network. This enables CLECs to offer more rigorous service level commitments to customers, to more effectively manage and maintain their networks, and to provide a wider variety of services than is possible with a market entry strategy that depends upon a hybrid network that is comprised of CLEC constructed fiber facilities and unbundled dark fiber, lit loops, and transport. In sum, a market entry strategy that relies on use of unbundled dark fiber still requires a substantial investment by the CLEC to seamlessly incorporate the dark fiber into its network and is the closest approach to a pure facilities-based market entry strategy, as contrasted with CLEC use of other UNEs. CLEC use of this excess ILEC dark fiber provides needed revenue to telecommunications equipment providers and promotes facilities-based competition by enabling CLECs to share in the ubiquity of ILEC networks, which were developed under the protection of their historic government-sanctioned monopolies.

In addition, by offering high-speed, dependable and redundant alternative transport services at a competitive price, EPGN is fostering competition by allowing its small CLEC and Commercial Mobile Radio Service ("CMRS") customers to focus on providing innovative services to their own retail customers. New entrants can obtain critical facilities from alternative providers such as EPGN while focusing on deploying advanced telecommunications equipment and developing innovative services that save their customers money and provide them functionality that they can't get elsewhere. The bottom line is that the business models of many CLECs would not be possible without continued access to the ILEC transport, dark fiber and "last mile" copper and fiber UNE infrastructure through alternative providers like EPGN. EPGN has spent the time and invested over $400 million in deployment of an alternative fiber transport network. As individual CLECs few of these CLECs could economically justify the level of investment EPGN has committed to the marketplace to build our own transport network. Nor would it be economically efficient to have each carrier deploying its own transport network. EPGN's alternative transport network thus allows smaller Texas CLECs to creatively offer competitive alternatives to Texas consumers while avoiding large, unnecessary and duplicative up front capital costs.